Journal of Natural Resources & Environmental Law

Volume 15
Issue 2 *Journal of Natural Resources & Environmental Law, Volume 15, Issue 2*

Article 7

January 2000

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Wanda A. Dotson
University of Kentucky

MOOTNESS AND ATTORNEYS' FEES UNDER THE CLEAN WATER ACT IN *THE OLD TIMER, INC. V. BLACKHAWK-CENTRAL CITY SANITATION DISTRICT*

WANDA A. DOTSON*

INTRODUCTION

By allowing citizens to enforce environmental laws under the Clean Water Act, Congress has articulated its intent that "[c]itizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests."[1] *The Old Timer, Inc. v. Blackhawk-Central City Sanitation District*[2] case followed the trend in most circuit court cases that have welcomed citizens into the pool of the environmental enforcement actors.[3] The Court held that the citizen-plaintiff may receive attorneys' fees if it shows that its action was the "substantial factor leading to the relief obtained" even though the violators had complied with the law and had paid a civil penalty to the government.[4]

In contrast, the Fourth Circuit Court of Appeals ruled in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[5] that a citizen group could not receive attorneys' fees because the corporation was now in compliance, making injunctive relief unnecessary. Further, mootness principles, the Fourth Circuit contended, prompted the Court to find that civil penalties are inappropriate as well since the polluters only pay the government, while the citizens go uncompensated.[6] Thus, civil penalties could not redress any injury to the citizens, failing the third prong of the Supreme Court's test for standing.[7] In 1999, the United States Supreme Court agreed to hear the *Laidlaw* case.[8]

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* J.D., 2001, University of Kentucky College of Law.

[1]Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

[2]The Old Timer, Inc. v. Blackhawk-Central City Sanitation District, 51 F. Supp. 2d 1109 (D. Colo. 1999) [hereinafter The Old Timer].

[3]*Id.* at 1116. Cases cited in *The Old Timer* indicate that most courts follow the same reasoning and allow plaintiffs to recover attorneys' fees and to overcome mootness claims even though injunctive relief is no longer available.

[4]*Id.* at 1119.

[5]Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *rev'd,* 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) [hereinafter Friends of the Earth v. Laidlaw].

[6]*Friends of the Earth v. Laidlaw*, 149 F.3d at 306-07. The U.S. Supreme Court reversed the Fourth Circuit's decision concerning attorneys' fees in citizen-plaintiff environmental actions.

[7]*Id. See supra* note 7 and accompanying text. The Court did not address the other two prongs, injury in fact and causation.

[8]Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *cert. granted,* 119 S. Ct. 1111 (1999). *See supra* note 7 and accompanying text.

This Comment focuses on the 1999 decision, *The Old Timer, Inc. v. Blackhawk-Central City Sanitation District*,[9] in which the district court did not agree with the Fourth Circuit in *Laidlaw* but followed other circuit court rulings. This Comment analyzes two major issues from *The Old Timer*: mootness and attorneys' fees. First, part I details the Clean Water Act. Part II then presents the facts and procedural history in this case. Part III explores the main issues of mootness and attorneys' fees. Finally, part IV examines the relationship between *The Old Timer* and existing case law, details Congressional intent of "prevailing party" in 33 U.S.C. § 1365 of the Clean Water Act, and ponders the impact of *The Old Timer*.

I. CLEAN WATER ACT

A. 33 U.S.C. § 1365 Citizen Suits

In 1972, Congress "substantially overhauled the nation's system of water pollution control"[10] by amending the Clean Water Act,[11] enacted in 1948.[12] This overhaul gave federal district courts jurisdiction to hear private citizen suits.[13] Previously, citizens used common law tort actions such as negligence, trespass, and nuisance to fight environmental pollution.[14] Yet these common law actions were individual claims later requiring governmental regulations to effect broad change.[15]

Once governmental regulations were in place, however, citizens became upset with the government for not adequately enforcing these laws or for not enacting more stringent laws.[16] Thus, Congress amended the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's water . . . ."[17] As part of that goal, Congress authorized guidelines for the amount of pollutants discharged into the water.[18] These guidelines provide for a National Pollutant Discharge Elimination System (NPDES) permit, issued through

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[9] *The Old Timer*, 51 F. Supp. 2d 1109.

[10] *Citizen's Action Under 33 U.S.C.A. § 1365(A)(1) for Violations of Effluent Standards or Limitations under Federal Water Pollution Control Act (33 §§ 1251 et seq.) or Orders with Respect Thereto*, 68 A.L.R. FED. 701, 704 (1984) [hereinafter *Citizen's Action*].

[11] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1999) [hereinafter Clean Water Act].

[12] Federal Water Pollution Control Act, Pub. L. 92-500, 62 Stat. 1155 (1948).

[13] Clean Water Act, 33 U.S.C. § 1365(a). *See generally Citizen's Action*, *supra* note 10.

[14] *See* Sharon Elliot, *Citizen Suits under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175, 176 (1987).

[15] *See id.* at 176.

[16] *See id.*

[17] Clean Water Act, 33 U.S.C. § 1251(a).

[18] *See* Elliot, *supra* note 15, at 177.

the Environmental Protection Agency (EPA) or a federally approved state program.[19] Under § 1365 Congress made citizens "an integral component of the Act's enforcement scheme,"[20] by allowing citizens to enforce these permits. Section 1365(a)(1) reads in part:

> (a) . . . *any citizen* may commence a *civil action on his own behalf*–
> (1) *against any person* (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is *alleged to be in violation* of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or . . . .[21]

Furthermore, Congress gave federal district courts the power to impose "any apropriate civil penalties under section 1319(d) of this title."[22] Thus, Congress allowed citizens to seek civil penalties but not to seek damages under the Clean Water Act.

B. Limitations on Citizen Suits

1. Notice

Under § 1365(b)(1)(A), Congress requires citizens to give sixty days notice prior to filing a lawsuit.[23] The citizen must give notice of the alleged violation to federal and state governments, as well as to the alleged violators.[24] In 1989, the Supreme Court in *Hallstrom v. Tillamook County* held the sixty-day notice mandatory.[25] In 1987, the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation* had reasoned that the "purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit."[26]

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[19]Clean Water Act, 33 U.S.C. § 1342(a)-(b).

[20]Bruce Allen Morris, *The Oregon Misstep and the Texas Two Step: Two Recent Appellate Cases Expand CWA Citizen Suits*, 11 NAT. RESOURCES & ENV'T 50 (1996).

[21]Clean Water Act, 33 U.S.C. § 1365(a)(1)(2) (emphasis added).

[22]Clean Water Act, 33 U.S.C. § 1365(a)(2).

[23]Clean Water Act, 33 U.S.C. § 1365(b)(1)(A).

[24]*Id.*

[25]Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989).

[26]Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987).

2. Diligent Prosecution

The *Gwaltney* Court ruled that the role of the citizen suit is "to supplement rather than to supplant governmental action."[27] Thus, under 33 U.S.C. § 1365(b)(1)(B), a citizen may not sue if the EPA or the state is "diligently prosecuting a civil or criminal action in a court."[28] In 33 U.S.C. § 1319(g)(6)(A)(ii) Congress has limited lawsuits in cases in which the state government "has commenced and is diligently prosecuting an action" under state law that is comparable to the Clean Water Act's administrative penalty set forth in § 1319(g). Under 33 U.S.C. § 1319(g)(6)(A)(iii), Congress has limited lawsuits where the state has issued a final order and "the violator has paid a penalty."[29]

3. Prevailing Party Requirement

The Clean Water Act's § 1365(d) makes attorneys' fees available only to a "prevailing or substantially prevailing party." In 1987 Congress added the "prevailing" or "substantially prevailing" requirement while retaining the previous language, "whenever the court determines such award is appropriate."[30] Part IV(B) of this Comment examines this language in detail.

II. *THE OLD TIMER* CASE

A. Facts

Defendant Blackhawk-Central City Sanitation District ("the District") collected and treated wastewater from the towns of Blackhawk and Central City, Colorado, and discharged the treated wastewater into North Clear Creek.[31] Plaintiff Robert L. Grisenti owned and operated The Old Timer, Inc., which was located seven miles downstream from the sewage treatment plant.[32] The Old Timer was a tourist attraction where people panned for gold in the North Clear Creek.[33] Obviously, the

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[27] *Id.*

[28] Clean Water Act, 33 U.S.C. § 1365(b)(1)(B).

[29] Clean Water Act, 33 U.S.C. § 1319(g)(6)(A)(ii)-(iii).

[30] 33 U.S.C. § 1365(d).

[31] *The Old Timer*, 51 F. Supp. 2d at 1111.

[32] *Id.*

[33] The Old Timer, Inc., Robert L. Grisenti and Rodney Cummings v. Blackhawk-Central City Sanitation District, En-Tech, Inc. a/k/a Environmental Technicians, Inc., and Water Quality Management Corp., Inc., No. 93-B-249, at 2-3 (D. Colo. filed Jan. 29, 1993) [hereinafter The Old Timer Complaint]. According to the complaint filed in this civil action, Grisenti leases the land to Cummings for operation of the tourist attraction during the summer.

tourists had "physical contact with the river."[34] Meanwhile, legalized gambling caused the populations in the towns of Blackhawk and Central City to grow; presumably, the increased demand inundated the sewage treatment plant.[35]

The District contracted with private industry to operate the treatment plant under a state-issued NPDES permit.[36] In July 1992 and August 1992 the District violated its permit, notably during the The Old Timer's peak season.[37] Eventually, on September 8, 1992 the state health department issued a Notice of Violation and Cease and Desist Order (NOV/CDO) to the District for the July and August 1992 violations.[38]

On September 22, 1992, although The Old Timer notified the District of its plan to sue,[39] it failed to notify the other defendants that it planned to sue.[40] The Clean Water Act, 33 U.S.C. § 1365(b), requires a sixty-day notice.[41] The Old Timer's notice referenced the state's NOV/CDO.[42] On January 29, 1993, The Old Timer and Grisenti filed suit in United States District Court in Colorado.[43]

The Sanitation District then compiled a "three-part plan that included immediate actions, interim improvements, and a large-scale treatment plant expansion."[44] Even so, on August 26, 1993, the EPA issued a violation for offenses committed during the interim period.[45] Ultimately, on September 19, 1995, the State approved an agreement with the Sanitation District and imposed a $85,000 civil penalty.[46]

B. Procedural History

On June 17, 1999, Judge Carlos Lucero, a Tenth Circuit judge sitting by designation, granted summary judgment to the three private operators[47] because The Old Timer had not notified these three defendants within the sixty-day period.[48] The Court denied The Old

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[34]*The Old Timer*, 51 F. Supp. 2d at 1111.
[35]*Id.*
[36]*Id.*
[37]*The Old Timer Complaint*, No. 93-B-249 at 3.
[38]*The Old Timer*, 51 F. Supp. 2d at 1111.
[39]*Id.* at 1119.
[40]*Id.* at 1111.
[41]33 U.S.C. § 1365(b)(1)(A).
[42]*The Old Timer*, 51 F. Supp. 2d at 1111.
[43]*Id.*
[44]*Id.* at 1111-12.
[45]*Id.* at 1112.
[46]*Id.*
[47]*Id.* at 1120.
[48]*The Old Timer*, 51 F. Supp. 2d at 1119. *See also* Hallstrom v. Tillamook County, 493 U.S. 20, 26-27 (1989).

Timer's request for summary judgment and referred the case back to the district judge for a determination on three issues.[49]

First, the district court must rule on the District's liability for violations under the Clean Water Act after May 16, 1994,[50] because the State's final order covered injuries through that date; thus, res judicata barred The Old Timer's action against the District through May 16, 1994.[51] Second, the Court must determine the District's liability for The Old Timer's pendent state law claims.[52] Those claims included trespass, nuisance, misrepresentation and concealment, as well as outrageous conduct.[53] Third, the District Court must determine whether The Old Timer is entitled to attorneys' fees for the defendant's alleged violations committed both before and after May 16, 1994.[54]

III. THE OLD TIMER OPINION: ISSUES OF MOOTNESS AND ATTORNEYS' FEES

A. Mootness

As a rule, the principle of mootness is a primary question for any court, derived from Article III Section 2 Clause 1 of the United States Constitution. Clause 1 states that the judicial power shall extend to all "cases or controversies."[55] Hence, in the pollution context, the *Gwaltney* Court ruled that "[l]ongstanding principles of mootness, however, prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'"[56] Thus a citizen must "make a good-faith allegation of continuous or intermittent violation," at the onset of

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[49] *The Old Timer*, 51 F. Supp. at 1120.

[50] *Id.*

[51] *Id.* at 1117. The court concluded that although The Old Timer's "civil penalty action is not precluded by either § 1319(g)(6)(A) or mootness doctrine, some of its claims–those specifically covered by the state's agency's final order–are nonetheless barred." *Id.* Judge Lucero ruled that a "state and its private citizens are in privity when the state, acting as parens patriae, brings an action for damage to a public resource." Thus, the state recovered penalties for July 1992 through May 16, 1994 violations. *Id.* at 1118.

[52] *Id.* at 1120.

[53] *The Old Timer Complaint*, No. 93-B-249 at 8-11.

[54] *The Old Timer*, 51 F. Supp. 2d at 1120. Both parties prepared a stipulated order, and on January 5, 2000, the district court judge granted the motion to dismiss with prejudice. Both sides agreed to pay their own costs and attorneys' fees. Telephone interview, Clerk, D. Colo. (Feb. 9, 2001).

[55] U.S. CONST. art. III, § 2, cl. 2.

[56] *Gwaltney*, 484 U.S. at 66 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 448 (CA2 1945))). The Court in *Gwaltney* examined the meaning of the words, "to be in violation," of § 1365(a)(1) and concluded that the "definition makes plain what the undeviating use of the present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Id.* at 59.

the lawsuit, thus squelching any mootness defense. Only then will the district court have jurisdiction.[57]

The primary issue in *The Old Timer* was whether the District's large-scale improvements mooted the controversy since the District had complied with its permit.[58] The judge concluded that The Old Timer's "claim for injunctive relief is moot because" the District complied with its permit and "its permanent improvements make it unlikely that the discharge violations at issue in this case will continue."[59]

Nevertheless, Judge Lucero ruled that the District's compliance does not moot The Old Timer's claim for civil penalties.[60] Using seven federal court decisions as support,[61] the Judge determined that "even if a polluter's post-complaint compliance moots a citizen's claim for injunctive relief, the citizen's claim for civil penalties is not moot."[62] Next, Judge Lucero noted two contrary court opinions, *Laidlaw*[63] and the 1998 *Dubois v. United States Department of Agriculture* decision.[64] Those courts held that once a "citizen's claim for injunctive or declaratory relief became moot, the citizen's claim for civil penalties was also rendered moot."[65]

Judge Lucero further explained that these two cases, *Laidlaw* and *Dubois*, rely on the Supreme Court's 1998 decision in *Steel Co. v. Citizens for a Better Environment*.[66] In that case, the Supreme Court determined that the citizen-plaintiff lacked standing.[67] Moreover, the Court concluded that a penalty paid to the United States Treasury would not redress an injury to the plaintiff but only redress its "'undifferentiated

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[57]*See Gwaltney*, 484 U.S. at 64.

[58]*See The Old Timer*, 51 F. Supp. 2d at 1115.

[59]*Id.* at 1116.

[60]*See id.* at 1116.

[61]*Id.* (citing Comfort Lake Ass'n, Inc. v. Dresel Contracting Inc., 138 F.3d 351, 356 (8th Cir. 1998); Atlantic States Legal Found., Inc. v. Stroh Die Casting Co., 116 F.3d 814, 820 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 442 (1997); Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg. Inc., 2 F.3d 493, 503 (3d Cir. 1993); Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp., 993 F.2d 1017, 1021 (2d Cir. 1993); Carr v. Alta Verde Indus. Inc., 931 F.2d 1055, 1065 n.9 (5th Cir. 1991); Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1135 (11th Cir. 1990); Paxtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986)).

[62]*The Old Timer*, 51 F. Supp. 2d at 1116.

[63]Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999).

[64]Dubois v. United States Dep't of Agric., 20 F. Supp. 2d 263, 268 (D.N.H. 1998) (holding that a claim for civil penalties became moot when claims for injunctive and declaratory relief became moot, reasoning that penalties to the United States Treasury could not redress citizen's injury).

[65]*The Old Timer*, 51 F. Supp. 2d at 1116.

[66]*Id.* at 1117. *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

[67]Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).

public interest' in faithful execution of [federal law]."[68] Thus, the claims were moot because the plaintiffs now lacked standing.

Unlike the alleged injury in *Steel*, The Old Timer's injuries are direct in that the alleged violations are ongoing and hurt the tourist attraction's reputation and business.[69] Thus, Judge Lucero believed that the District's "future compliance with its permit and fining the polluter for its recent violations may well alleviate the concerns of potential clients or repeat customers, and thus redress the injury to The Old Timer's tourist reputation."[70]

B. Attorneys' Fees

Section 1365(d) of the Clean Water Act makes attorneys' fees available only to a "prevailing or substantially prevailing party."[71] Judge Lucero in *The Old Timer* referred the issue of attorneys' fees to the district judge to determine if the company was in fact a "prevailing party."[72] The district judge must determine if The Old Timer "was a *substantial factor* motivating the [state's] enforcement proceeding or the District's act of bringing itself into compliance and settling the penalty proceeding."[73] Thus, it is a fact question for the judge.

On the other hand, the Fourth Circuit Court of Appeals in *Laidlaw* concluded that the environmental groups were not entitled to $2 million dollars in litigation fees[74] because they were not prevailing parties since the controversy was now moot.[75] They appealed, and the Supreme Court granted certiorari, hearing arguments on October 12, 1999.[76]

IV. ANALYSIS

The Old Timer correctly followed the majority of cases that have addressed the issues of mootness and attorneys' fees under the Clean Water Act. The next section of this Comment considers *The Old Timer's*

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[68] *Id.* at 1018 (citing and quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992)).

[69] *The Old Timer*, 51 F. Supp. 2d at 1117.

[70] *Id. See also* Tull v. United States, 481 U.S. 412, 422-23 (1987) (noting that the purpose of CWA civil penalties is "retribution," "deterrence" and "restitution").

[71] 33 U.S.C. § 1365(d).

[72] *The Old Timer*, 51 F.Supp. 2d at 1120 (emphasis added).

[73] *Id.*

[74] Seth Borenstein, *Pollution Suits Face Hurdle in High Court*, LEXINGTON HERALD-LEADER, October 9, 1999, at A3.

[75] *Friends of the Earth v. Laidlaw*, 149 F.3d at 307 n.5.

[76] Borenstein, *supra* note 75, at A3.

relationship to existing case law, contemplates the intent of "prevailing party" and ponders the possible impact of *The Old Timer*.

A. *The Old Timer's* Relationship to Existing Case Law

The Supreme Court's prior decisions and a dozen circuit court decisions demanded that the court in *The Old Timer* rule as it did on the mootness and attorneys' fees issues. For example, the Eighth Circuit Court of Appeals ruled in its 1998 *Comfort Lake Association, Inc. v. Dresel Contracting Inc.*[77] decision that "even if a polluter's *voluntary* permanent cessation of the alleged violations moots a citizen suit claim for injunctive relief, it does not moot a related claim for civil penalties."[78]

Regarding attorneys' fees, the judge in *The Old Timer* relied on the Supreme Court's "catalyst test" from the 1987 decision, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*.[79] The "catalyst test" states that "if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions."[80]

The *Laidlaw* court, however, relied on the 1992 Supreme Court case, *Farrar v. Hobby*.[81] In that case, the Court determined that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim."[82] The *Farrar* holding is much different than the catalyst test. Incidentally, the *Farrar* decision was not a Clean Water Act case nor was it a case in which mootness was an issue. Nonetheless, the *Laidlaw* court believed that the *Gwaltney* decision allowing litigation costs under § 1365(d)[83] (the "catalyst test") was no longer applicable because Congress had passed amendments in 1987 to § 1365(d).[84] At any rate, the *Laidlaw* court used *Farrar* to preclude the plaintiffs from receiving attorneys' fees.[85]

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[77]Comfort Lake Ass'n, Inc. v. Dresel Contracting Inc., 138 F.3d 351 (8th Cir. 1998).

[78]*Id.* at 356. *See also* Atlantic States Legal Found., Inc. v. Stroh Die Casting Co., 116 F.3d 814, 820 (7th Cir. 1997), *cert. denied*, 522 U.S. 918 (1997); Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg. Inc., 2 F.3d 493, 503 (3d Cir. 1993); Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp., 993 F.2d 1017, 1021 (2d Cir. 1993); Carr v. Alta Verde Indus. Inc., 931 F.2d 1055, 1065 n.9 (5th Cir. 1991); Atlantic States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1135 (11th Cir. 1990); Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986).

[79]*Gwaltney*, 484 U.S. at 49.

[80]*Id.* at 67 n.6 (quoting S. REP. NO. 92-414, at 81 (1971), 2 Leg. Hist. 1499).

[81]Farrar v. Hobby, 506 U.S. 103 (1992).

[82]*Id.* at 111.

[83]In *Gwaltney*, the Supreme Court stated that award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict." *Gwaltney*, 484 U.S. at 67 n.6 (1987).

[84]*Friends of the Earth v. Laidlaw*, 149 F.3d at 306 n.5.

[85]*Id.*

There are at least ten circuit court decisions that have followed the reasoning in *The Old Timer* regarding the "substantial factor" or "catalyst test" from *Gwaltney*.[86] In 1994, for example, in *Baumgartner v. Harrisburg Housing Authority*,[87] the Third Circuit Court of Appeals stated, "[w]e believe it is not likely that the Supreme Court [in *Farrar*] would overturn such a wide-spread theory without even once mentioning it, particularly when it was inapplicable to the case at hand."[88] Also, the environmental groups in *Laidlaw* think it is odd that the *Farrar* Court overruled the catalyst test "without expressly indicating that it was doing so."[89] Therefore, it is logical for courts to believe that the "catalyst test" abounds today.

B. Intent of "Prevailing Party"

In 1987 Congress amended § 1365(d) by adding the "prevailing" or "substantially prevailing" requirement while retaining, "whenever the court determines such award is appropriate."[90] Prior to the amendments, courts were reading the "appropriate" language to allow "a court to award fees even to a non-prevailing environmental suit plaintiff, so long as the lawsuit had other salutary effects, such as clarifying the law, ensuring representation of environmental interests before the court, or focusing attention on important environmental issues."[91] The legislative history of the 1987 amendment "shows that the change in the language . . . was intended merely to clarify Congress' intent that citizen plaintiffs not receive attorneys' fee awards when the plaintiffs had lost the litigation."[92]

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[86]*See* Brief for Petitioners, 1999 WL 311764, at *48; Friends of the Earth v. Laidlaw, 149 F.3d 303 (1999) (citing Maduka v. Meissner, 114 F.3d 1240, 1241 (D.C. Cir. 1997); Marbley v. Bane, 57 F.3d 224, 234 (2d Cir. 1995); Kilgour v. City of Pasadena, 53 F.3d 1007, 1010 (9th Cir. 1995); Zinn by Blankenship v. Shalala, 35 F.3d 273, 274-276 (7th Cir. 1994); Beard v. Teska, 31 F.3d 942, 951-952 (10th Cir. 1994); Baumgartner v. Harrisburg Housing Auth., 21 F.3d 541, 547 (3d Cir. 1994); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1, 17 F.3d 260, 262-263 (8th Cir. 1994); American Council of the Blind v. Romer, 992 F.2d 249, 250-251 (10th Cir. 1993); Craig v. Gregg County, Texas, 988 F.2d 18, 20-21 (5th Cir. 1993); Paris v. HUD, 988 F.2d 236, 240-241 (1st Cir. 1993); Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255, 257-258 (6th Cir. 1993)).

[87]Baumgartner v. Harrisburg Housing Auth., 21 F.3d 541 (3d Cir. 1994).

[88]*Id.* at 547. *See also* Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 128 (2d Cir. 1991) (ruling that "[w]e believe that when the polluter's settlement with state authorities follows the proper commencement of a citizen suit, one can, absent contrary evidence, infer that the existence of the citizen suit was a motive for the polluter's settlement and that the citizen suit plaintiff is therefore a prevailing party.").

[89]Brief for Petitioners, 1999 WL 311764, at *46 n.27, Friends of the Earth v. Laidlaw, 149 F.3d 303 (1999) (quoting Zinn by Blankenship v. Shalala, 35 F.3d 273, 276 (1994)).

[90]33 U.S.C. § 1365(d). *See* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 781 (1993).

[91]Sisk, *supra* note 91, at 778.

[92]Brief for Petitioners, 1999 WL 311764, at *46 n.27, Friends of the Earth v. Laidlaw,

Thus, Congress did not eliminate the "catalyst test." It merely reeled in courts that were awarding attorneys' fees to non-prevailing parties.

In *Farrar*, as noted earlier, the Supreme Court ruled that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim."[93] The *Farrar* Court concluded that the plaintiff could be a prevailing party if the court awarded nominal damages in the 42 U.S.C. § 1988 action.[94] The Court stated, "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."[95] The Court in *Farrar* stated that "comparable relief through a consent decree or settlement" is "some relief on the merits."[96]

The environmental groups in *Laidlaw* point out that prior to *Farrar* it was settled law "that a plaintiff has prevailed for purposes of fees when, in the absence of a court order or a settlement, a voluntary change in the defendant's conduct as a result of a lawsuit has redressed the plaintiff's grievances."[97] In other words, a plaintiff may prevail even without winning a court order or settlement.

The Old Timer court defined "prevailing party" as a citizen-plaintiff who was the "substantial factor leading to the relief obtained."[98] In *The Old Timer*, the defendant District entered an agreement with state regulators after The Old Timer filed suit,[99] and in *Laidlaw*, the court found that the state regulators had not diligently prosecuted the company to force compliance.[100] Thus, the parties modified or changed their conduct and in doing so, the plaintiffs were "prevailing parties."

Of course, there are limits. Jan Amundson, attorney for the National Association of Manufacturers, has said, "We would hope it [the *Laidlaw* decision] would be discouraging of frivolous litigation."[101] The facts in *The Old Timer* indicate that its lawsuit was not frivolous. Judge

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149 F.3d 303 (1999) (citing S. REP. NO. 233, 98th Cong. 1st Sess. 24-25 (1983); LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, 100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312 (remarks of Senator Chafee, the sponsor of the legislation)).

[93]Farrar v. Hobby, 506 U.S. 103, 111 (1992).

[94]*Id.* The Court in *Farrar* reasoned that fees must be reasonable and that "because of his failure to prove an essential element of this claim for monetary relief, the only reasonable fee is usually no fee at all." *Id.* at 115.

[95]*Id.*

[96]*Id.* at 111.

[97]Brief for Petitioners, 1999 WL311764, at * 46, Friends of the Earth v. Laidlaw, 149 F.3d 303 (1999)

[98]*The Old Timer*, 51 F. Supp. 2d at 1119.

[99]*Id.* at 1112.

[100]*Friends of the Earth v. Laidlaw*, 149 F.3d at 305.

[101]Borenstein, *supra* note 75, at A3 (quoting Amundson who filed a brief supporting Laidlaw).

Lucero noted that "there is at least some evidence in the record that The Old Timer's conduct motivated both the [state] to enforce the law strictly and the District to make the improvements and settle the penalty proceeding."[102] The facts of *Laidlaw* also suggest that the ongoing violations prompted the environmental groups to seek judicial relief under the Clean Water Act.[103]

C. The Impact of *The Old Timer*

The impact of The Old Timer hinges, in part, on the Supreme Court. If the Supreme Court affirms the Fourth Circuit's holding in *Laidlaw*, the Court will surely frustrate the purpose that Congress envisioned from the citizen suit provision of the Clean Water Act.[104] Congress believed that citizens would instigate lawsuits to abate or halt pollution.[105] Otherwise, the desired outcome from these lawsuits, polluter compliance and abatement of pollution, has the undesirable effect of mooting the lawsuit and precluding attorneys' fees. That outcome would be devastating to citizens and to the long-reaching impact of *The Old Timer*.

Admittedly, The Old Timer, as a private corporation, may have resources to pay for legal help to ensure clean water at its tourist attraction. Yet, nonprofit organizations such as Friends of the Earth may not have those resources.[106] Consequently, these groups cannot afford attorneys to fight the alleged polluters.[107] By allowing citizens to enforce the Clean Water Act, Congress intended for citizens to participate when the government had not and for courts to award attorneys' fees when appropriate. Thus, the "catalyst test" in *The Old Timer* is the correct test for determining a "prevailing party" award and fulfills Congress' mandate to welcome citizens into the environmental enforcement arena. Judge Lucero was right. If citizens prod the government into action, then they deserve reasonable attorneys' fees for their efforts.

David Lewis, executive director of Save The Bay, has said that a

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[102]*The Old Timer*, 51 F. Supp. 2d at 1119.

[103]*Friends of the Earth v. Laidlaw*, 149 F.3d at 305.

[104]*See* Amicus Brief for the Public Citizen and the American Civil Liberties Union, 1999 WL 311755, at *8, Friends of the Earth v. Laidlaw, 149 F.3d 303 (4th Cir. 1998), *rev'd,* 120 S.Ct. 693 (2000).

[105]*Gwaltney*, 484 U.S. at 61 (citing legislative history from the 1972 amendments).

[106]Borenstein, *supra* note 75, at A3 (quoting David Lewis, executive director of Save The Bay, "All you have to do is look at my budget to see that we're not getting fat off of these lawsuits.").

[107]*See* Amicus Brief for Public Citizen and the American Civil Liberties Union, 1999 WL 311755, at *19, Friends of the Earth v. Laidlaw, 149 F.3d 303 (4th Cir. 1998), *rev'd,* 120 S.Ct. 693 (2000).

citizens' suit's purpose is "to make sure that environmental pollution laws are enforced."[108] Indeed that is what we all hope. The laws, enforced either by government or citizens, help ensure clean water for everyone, even tourists panning for gold in the North Clear Creek.

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The United States Supreme Court ruled on January 12, 2000 in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, (TOC), Inc.*[109] that the environmental groups' claims for civil penalties were not moot even though the defendant had come into compliance.[110] The Court concluded that "[i]t would be premature, however, for us to address the continuing validity of the catalyst theory in the context of this case."[111] The issue of attorneys' fee was left to the federal district court to address.[112] Nevertheless, the Court noted that several Court of Appeals had determined that *Farrar* did not "repudiate the catalyst theory."[113]

On May 29, 2001, the United States Supreme Court ruled that the 'catalyst theory" is an inappropriate test for determining a "prevailing party."[114] The Court held:

> Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.[115]

The *Buckhannon* decision involved the interpretation of "prevailing party" in the Fair Housing Amendments Act of 1988 and the American with Disabilities Act of 1990.[116]

Federal courts that want to award attorneys' fees in cases such as *The Old Timer* may find that the cases are not moot as the Supreme Court did in *Laidlaw* and award attorneys' fees anyway.

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[108]Borenstein, *supra* note 75, at A3 (quoting Lewis).

[109]*Friends of the Earth v. Laidlaw*, 120 S. Ct. 693 (2000).

[110]*Id.* at 700.

[111]*Id.* at 711.

[112]*Id.*

[113]*Id.*

[114]*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835 (2001).

[115]Id. at 1838.

[116]Id.